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Nos. 95-931 and 95-944

In the Supreme Court of the United States

OCTOBER TERM, 1995

UPS WORLDWIDE FORWARDING, INC., PETITIONER

v.

UNITED STATES POSTAL SERVICE

AIR COURIER CONFERENCE OF AMERICA/
INTERNATIONAL COMMITTEE, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Postal Service has authority to offer individually negotiated rates to large-volume users of international mail.

2. Whether the President consented to the Postal Service's establishment of the program for individually negotiated rates challenged in this case when he permitted the program to take effect without objection.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	10
Conclusion	22
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Air Courier Conference of America v. *United States Postal Service*, 959 F.2d 1213 (3d Cir. 1992)	2, 11
Air Courier Conference of America v. *American Postal Workers Union*, 498 U.S. 517 (1991)	3
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	9-10, 15
Clarke v. *Securities Industry Ass'n*, 479 U.S. 388 (1987)	21
Fleming v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111 (1947)	20
Fort Wayne Community Schools v. *Fort Wayne Educ. Ass'n*, 977 F.2d 358 (7th Cir. 1992), cert. denied, 114 S. Ct. 90 (1993)	17-18
Franchise Tax Board v. *United States Postal Service*, 467 U.S. 512 (1984)	15
Loeffler v. *Frank*, 486 U.S. 549 (1988)	3
MCI Telecomm. Corp. v. *FCC*, 917 F.2d 30 (D.C. Cir. 1990)	13
National Association of Greeting Card Publishers v. *United States Postal Service*:	
607 F.2d 392 (D.C. Cir. 1979), cert. denied, 444 U.S. 1025 (1980)	18
462 U.S. 810 (1983)	15
Rockville Reminder, Inc. v. *United States Postal Service*, 480 F.2d 4 (2d Cir. 1973)	16

Cases—Continued: Page

Sea-Land Serv., Inc. v. *ICC*, 738 F.2d 1311 (D.C. Cir. 1984) 13
United Parcel Service, Inc. v. *United States Postal Service*, 604 F.2d 1370 (3d Cir. 1979), cert. denied, 446 U.S. 957 (1980) 12

Constitution and statutes:

U.S. Const.:
Art. II, § 2, Cl. 2 20
Art. III 5
Administrative Procedure Act, 5 U.S.C. 702 21
First War Powers Act of 1941, ch. 593, 55 Stat. 838, 50 U.S.C. App. 601 (1946) 20
Interstate Commerce Act, 49 U.S.C. 10741(a) 12
Postal Reorganization Act, 39 U.S.C. 101 *et seq.*:
§ 101(d), 39 U.S.C. 101(d) 3, 5, 6, 7
§ 401(2), 39 U.S.C. 401(2) 16
§ 401(3), 39 U.S.C. 401(3) 16
§ 401(10), 39 U.S.C. 401(10) 16
§ 403, 39 U.S.C. 403 8
§ 403(b)(2), 39 U.S.C. 403(b)(2) 2, 5, 10, 11
§ 403(c), 39 U.S.C. 403(c) 3, 5, 7, 10, 11, 12, 13, 14
§ 404(2), 39 U.S.C. 404(2) 16
§ 407, 39 U.S.C. 407 11
§ 407(a), 39 U.S.C. 407(a) 2, 5, 6, 9, 11, 16, 19, 20
§ 410(a), 39 U.S.C. 410(a) 21
§ 601(b), 39 U.S.C. 601(b) 3
§§ 3601-3628, 39 U.S.C. 3601-3628 (1988 & Supp. V 1993) 2
§ 3623, 39 U.S.C. 3623 10
§ 3623(d), 39 U.S.C. 3623(d) 10
§ 3683, 39 U.S.C. 3683 (1988 & Supp. V 1993) 10

Miscellaneous:

58 Fed. Reg. 29,778-29,782 (1993) 3
59 Fed. Reg. 65,471 (1994) 9

Miscellaneous—Continued: Page

Lawfulness of Volume Discount Rates by Motor Common Carrier of Property, 365 I.C.C. 711 (1982) 13
Webster's Third New International Dictionary (1986) 12

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-931

UPS WORLDWIDE FORWARDING, INC., PETITIONER

v.

UNITED STATES POSTAL SERVICE

No. 95-944

AIR COURIER CONFERENCE OF AMERICA/
INTERNATIONAL COMMITTEE, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (UPS Pet. App. A1-A43)[1] is reported at 66 F.3d 621. The opinion of the

[1] In this brief, we refer to the petition in No. 95-931 as "UPS Pet." and the petition in No. 94-944 as "ACCA Pet."

district court (UPS Pet. App. A44-A59) is reported at 853 F. Supp. 800.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1995. The petitions for a writ of certiorari were filed on December 13, 1995 (No. 95-931) and December 14, 1995 (No. 95-944). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1970, when Congress created the United States Postal Service in the Postal Reorganization Act (PRA), it established two mechanisms for the setting of postal rates. Domestic postal rates are set by the Postal Service under a complex process that also involves the Postal Rate Commission. See 39 U.S.C. 3601-3628 (1988 & Supp. V 1993). Ratemaking for international mail does not involve the Postal Rate Commission. See *Air Courier Conference of America* v. *United States Postal Service*, 959 F.2d 1213 (3d Cir. 1992). The authority to establish international rates is vested in the Postal Service and the President under 39 U.S.C. 407(a), which provides that "[t]he Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions, and may establish the rates of postage or other charges on mail matter conveyed between the United States and other countries."

The Postal Service's ratemaking authority is subject to a number of general constraints under the PRA. The Postal Service has a general duty to "provide types of mail service to meet the needs of different categories of mail and mail users." 39 U.S.C. 403(b)(2). The statute also requires that

postal rates "apportion the costs of all postal operations to all users of the mail on a fair and equitable basis." 39 U.S.C. 101(d). In addition, in providing services and setting rates, the Postal Service must not "make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preference to any such user." 39 U.S.C. 403(c).

2. This case concerns International Customized Mail service (ICM), a program under which the Postal Service negotiates volume-based rates with large-scale users of international mail. The origin of ICM lies in the Postal Service's decision, in 1986, to suspend in part its statutory postal monopoly and to permit "international remailing," a practice by which private courier companies deposit letters destined for foreign addresses with foreign postal systems. See *Air Courier Conference of America* v. *American Postal Workers Union*, 498 U.S. 517, 519-520 (1991); 39 U.S.C. 601(b). Having permitted private companies to compete with it for delivery of international mail, the Postal Service then adopted the ICM program to make its own international mail delivery service competitively attractive to customers. That action responds to Congress's decision, when it created the Postal Service in 1970, that the Service should be "run more like a business than had [been] its predecessor, the Post Office Department." *Loeffler* v. *Frank*, 486 U.S. 549, 556 (1988).

In May, 1993, the Postal Service adopted a final rule implementing ICM. See 58 Fed. Reg. 29,778-29,782 (*reprinted at* ACCA Pet. App. 60a-83a). Under ICM, a qualifying mailer and the Postal Service can negotiate an individual agreement, which specifies the type of mail to be tendered, minimum volume

commitments, and the rate of postage. *Id.* at 81a-82a. To qualify for ICM, a mailer must be capable, on an annual basis, of tendering at least 1,000,000 pounds of international mail, or tendering mail costing at least $2 million in international postage; it must also be capable of tendering all of its ICM mail from a single location. *Id.* at 81a. Most of the information contained in each ICM agreement (including the negotiated rates) is published in the Postal Bulletin. See, *e.g.*, UPS Pet. App. A69-A76.[2] Once any particular ICM agreement is concluded, the Postal Service undertakes to make the same terms available to any similarly situated mailer. ACCA Pet. App. 78a.

In its commentary accompanying the final ICM rule, the Postal Service explained that it had "found it increasingly difficult to compete effectively against other providers" of international mail services, and that ICM was needed "to provide the Postal Service with the pricing flexibility necessary to attract new business customers and to keep existing business customers at rates that accurately reflect the Postal Service's costs of delivering the customer-specific mail volumes." ACCA Pet. App. 70a. It also noted that, because the ICM program will attract new customers that would otherwise use private couriers, ICM "makes all of the Postal Service's customers better off because the additional business generated not only covers the extra variable costs it causes, but

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[2] The only significant terms required to be contained in an ICM agreement that are not published in the Postal Bulletin are the weight and size limits on the mail covered by the agreement, and the location from which the mailer is required to tender the items to the Postal Service. ACCA Pet. App. 82a-83a.

also enables the Postal Service to recover its fixed costs from a larger base of customers." *Id.* at 71a. It therefore concluded that focusing "its marketing efforts on the large business customers that collectively make up the most competitive market" would be a sensible business practice. *Id.* at 73a.

3. Petitioner UPS Worldwide Forwarding, Inc. (UPS), a private international delivery service, brought this action against the Postal Service in district court to challenge the validity of ICM agreements. UPS contended that negotiated, individualized rates for particular mailers violate Sections 101(d), 403(b)(2), 403(c), and 407(a) of the PRA (39 U.S.C. 101(d), 403(b)(2), 403(c), and 407(a)). UPS also argued that Section 407(a) requires the approval of the President for the establishment of any rates for international mail, and that the required approval was not given for ICM. Petitioner Air Courier Conference of America/International Committee (ACCA), an association of firms engaged in letter and parcel delivery services, moved to intervene as a party plaintiff.

The district court granted UPS's motion for summary judgment. UPS Pet. App. A44-A59. The court first held that UPS had standing to sue, under both Article III and the prudential requirements for standing. UPS Pet. App. A48-A50.

The court then accepted virtually all of UPS's arguments on the merits. It ruled, first, that individualized ICM agreements violate Section 403(b)(2), which requires the Postal Service to establish "categories" of mail and mail users. UPS Pet. App. A51. It held next that ICM agreements violate the statutory prohibition against "undue or unreasonable discrimination" among mailers (39 U.S.C. 403(c)),

because the eligibility criteria for ICM service require only that a mail user be *capable* of tendering 1,000,000 pieces of mail a year, not that the mailer actually commit to tendering that large amount of mail. UPS Pet. App. A51-A52. Under the ICM criteria, the court remarked, one mailer could get a better rate than another, even if the two in fact ended up tendering the same amount of mail to the Postal Service over the course of a year. *Ibid.* That result, held the court, also violates Section 101(d), which requires the Postal Service to apportion the costs of its service on a fair and equitable basis. UPS Pet. App. A52-A53.

The court also agreed with UPS that Section 407(a) requires presidential approval for international ratemaking, and that such approval was not obtained for the ICM program. It rejected the Postal Service's argument that Section 407(a) required only that the President consent to international postal conventions negotiated by the Service, not that he approve international rates set by the Service. UPS Pet. App. A53-A55.[3]

4. The court of appeals reversed. UPS Pet. App. A1-A43. The court agreed with the district court that UPS satisfied the requirements for constitutional standing (*id.* at A8-A9) and prudential standing (*id.* at A10-A24). It noted that "the primary focus of the parties' dispute over standing" was whether UPS's interests as a competitor of the Postal Service fell within the "zone of interests" protected by the PRA.

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[3] The court granted ACCA's motion to intervene, and declined to address ACCA's standing, since it had already concluded that UPS had standing to initiate the suit. UPS Pet. App. A56-A58 & n.5.

Id. at A15. It concluded that UPS satisfied that requirement of prudential standing because the rate-setting provisions of the PRA upon which its claim rested were "inextricably linked" to the separate, "private express" provisions of the PRA governing the postal monopoly, and because both parts of the PRA were intended to "affect" competitors of the Postal Service. *Id.* at A21.

On the merits, the court of appeals rejected the district court's reading of the statutory provisions at issue. Contrasting the PRA's complex rate-setting mechanism for domestic mail with the international rate-making provision, which it described as "a model of simplicity," it concluded that Congress had intended to grant the Postal Service "significant authority and flexibility" in establishing international rates. UPS Pet. App. A25-A26. And, contrary to the district court, the court of appeals determined that the Postal Service had provided a "reasonable explanation" for its "business decision" to base the eligibility threshold for ICM service on a customer's capacity (rather than actual commitment) to supply a particular volume of business—namely, that to require a firm commitment would "drive [customers] off." *Id.* at A30. "We see nothing in the PRA," the court stated, "that prevents the Postal Service from innovative attempts to increase business and profits, as long as it stays within the bounds of the relevant statutes." *Id.* at A31.

The court concluded that ICM does not violate either the requirement of Section 101(d) that postal costs be apportioned on a "fair and equitable basis," or that of Section 403(c) that the Service not engage in "undue or unreasonable discrimination" or give "undue or unreasonable preferences." UPS Pet. App.

A31-A34. Noting that "[t]he determination whether a particular rate is 'fair' or 'equitable' is not capable of precise definition," the court upheld the Postal Service's decision to grant discounts based on capacity for, rather than commitment to, large-scale mailing, since that choice "reflects a reasonable business decision about the most effective means to solicit new customers." *Id.* at A31. As for the ban on "undue or unreasonable" practices, the court noted that the statutory language necessarily "means that reasonable discrimination and preferences among users of the mail are permitted." *Ibid.* "Allowing a limited class * * * to negotiate individual service plans at individual rates does not appear on its face to be 'undue or unreasonable,'" since it permits the Service "to compete more effectively for the business of large-volume mailers * * *, fulfilling congressional intent." *Id.* at A31-A32. The court observed that other courts "have accorded postal authorities broad latitude" when considering whether postal rate classifications violate the ban on undue preferences. *Id.* at A32-A34.

The court also concluded that ICM does not contravene Section 403, setting forth the "general duties" of the Postal Service and providing that the Service shall "provide types of mail service to meet the needs of different categories of mail and mail users." UPS Pet. App. A34-A36. It reasoned that the group of customers capable of delivering 1,000,000 pieces of mail annually is a "category" of mail users, and it rejected the contention that the general provision relied on by UPS by implication prohibited the negotiation of individual rates with large-scale users. *Id.* at A35. "There is nothing in this section," the court stated, "that bars the Postal Service from

doing more than the minimum required here"—providing service to "meet the needs of different categories of mail and mail users." *Id.* at A36.

The court further rejected UPS's contention that Section 407(a) requires affirmative manifestation of consent to international rates by the President.[4] Noting that the statutory language regarding presidential consent has been essentially unchanged since 1851, and that the consistent historical practice has been for international rates to become effective without express presidential consent, the court "decline[d] * * * to prescribe certain procedural steps the President must take" to manifest his consent. UPS Pet. App. A39. It therefore concluded that the President had, within the meaning of Section 407(a), consented to the Postal Service's implementation of ICM by not objecting to it.

Finally, the court considered the degree of deference to be accorded to the Service's interpretation of the PRA. It noted that, in a prior decision, it had found controlling the principles of *Chevron U.S.A.*

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[4] On appeal, the Postal Service did not challenge the district court's conclusion that Section 407(a) requires presidential consent to international postage rates as well as international postal conventions. Rather, it argued that, with respect to international rates, the President had consistently followed a practice of consenting by allowing them to take effect without objection. See UPS Pet. App. A37.

While the appeal was pending, the President issued a memorandum expressly delegating, to the Governors of the Postal Service, his authority to consent to international postal rates. That delegated authority is effective until the issuance of the court of appeals' mandate in this case. See App., *infra*, 1a-3a; 59 Fed. Reg. 65,471 (1994). Neither petitioner has argued here that the President's delegation is insufficient, under Section 407(a), to sustain the validity of ICM.

Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). UPS Pet. App. A42. It also stated that, because in this case the Service was construing a regulation explicitly designed to take away customers from competitors, a "reduced level of deference" might be appropriate. But because the court was "convinced the ICM service does not contravene the PRA," it did not resolve the issue, and did not rely on "any deference that might be due." *Id.* at A43.

ARGUMENT

1. Both petitioners contend that various Sections of the PRA prohibit the Postal Service from negotiating individualized service agreements. UPS Pet. 9-22; ACCA Pet. 21-22. Those contentions are incorrect.

a. Both petitioners rely on 39 U.S.C. 403(b)(2), which charges the Postal Service with the obligation to provide "types" of mail service to "categories" of mail users. See UPS Pet. 9-10; ACCA Pet. 22. That charge, however, does not forbid the Postal Service from meeting particularized needs of individual mail customers. As the court of appeals pointed out (UPS Pet. App. A35), Congress showed elsewhere that it knew how to restrict the Service's flexibility in setting postal rates. See, *e.g.*, 39 U.S.C. 3623(d) and 3683 (1988 & Supp. V 1993) (both requiring "uniform" rates for certain kinds of mail).[5]

As the court of appeals also observed (UPS Pet. App. A35), the group of customers that meets the

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[5] For the same reasons, ACCA's reliance on the Service's responsibility to establish "classifications" (39 U.S.C. 403(c)) and a "mail classification schedule" (39 U.S.C. 3623) does not support its "plain meaning" argument that the statute precludes individualized rates. See ACCA Pet. 22.

eligibility criteria for ICM service comprises a "category" of mail users, and negotiated individualized service agreements with those customers are a "type" of service. Because the terms of any negotiated ICM contract are available to all similarly situated mailers (ACCA Pet. App. 78a), the formation of an ICM contract creates a "category" of mail users to which the Postal Service will provide a particular "type" of service.

Petitioners' construction of Section 403(b)(2) is further undermined by the language of Section 403(c), which expressly forbids undue and unreasonable discrimination and preferences in the provision of postal services and the setting of postal rates. The court of appeals correctly recognized that this language means that distinctions among users are permissible if they are not unreasonable. See UPS Pet. App. A31, A35.

b. Both petitioners invoke Section 407(a), which grants the Service authority to "establish" international "rates" of postage. UPS contends that Congress's use of "establish" shows that it intended "something more lasting" than negotiation of prices and services on a mailer-specific basis. UPS Pet. 10-11. As the court of appeals pointed out, however, "establish" cannot mean the creation of permanent rates, since the Postal Service would then be barred from ever changing its rates, which Congress could not possibly have intended. UPS Pet. App. A37.[6]

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[6] UPS's reliance on *Air Courier Conference of America* v. *United States Postal Service*, where the Third Circuit earlier quoted a dictionary definition of "establish" as meaning "to set up . . . permanently," is misplaced. In that case, the court of appeals contrasted "establish" with terms such as "request,"

ACCA focuses on the statutory word "rate," arguing that its use compels the conclusion that Congress intended to bar individualized negotiation of prices and services. ACCA Pet. 21-22. The meaning of that broad term, however, is not confined to a price available to all or most customers. See *Webster's Third New International Dictionary* 1884 (1986) (def. 2(3b): "a charge, payment, or price fixed according to a ratio, scale, or standard"); see also *United Parcel Service, Inc.* v. *United States Postal Service*, 604 F.2d 1370, 1377 (3d Cir. 1979) (rejecting the argument that "rate" in another provision of the statute applies only to a service made available to all members of the public on the same terms), cert. denied, 446 U.S. 957 (1980).

c. Petitioner UPS contends that ICM service violates the prohibition in Section 403(c) against "undue or unreasonable" discrimination and preferences. See UPS Pet. 11-17. In making that argument, UPS relies exclusively on cases construing the prohibition on unreasonable discrimination and preferences in the Interstate Commerce Act (49 U.S.C. 10741(a)) and other statutes that incorporate that Act's language. UPS did not rely on that line of authority in the court of appeals, nor did it give that court the opportunity to consider its current contention that ICM service—particularly the lack of a volume commitment in the threshold eligibility requirements for such service—is contrary to the

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used elsewhere in the statute, to emphasize the breadth of the Service's powers under Section 407. See 959 F.2d at 1220-1221.

"[e]stablished [l]aw" of undue discrimination. UPS Pet. 11.[7]

In any event, recent cases establish that individualized negotiated rates are not *per se* violations of statutory prohibitions against undue discrimination, if the negotiated rates are made public, and if the same rates are available to similarly situated customers.[8] The ICM program meets those requirements. The Postal Service has made clear that it will make rates contractually negotiated with a particular mail user available to any similarly situated user. See ACCA Pet. App. 78a. Those rates, along with most other terms of each agreement, are published in the Postal Bulletin, which is available by subscription from the Government Printing Office and is well known to large-volume mailers and competing carriers. UPS complains that "only selected contract terms are published" (UPS Pet. 4), but the only terms that (under the final ICM rule) must be

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[7] In its court of appeals brief, UPS referred to Section 403(c)'s prohibition against undue discrimination and preferences only once in its argument section; it there contended broadly that the provision was inconsistent with any individually negotiated rate. See UPS C.A. Br. 33 (asserting that Section 403(c) "presuppose[s] that rates are established on the basis of groupings of mail or mail users rather than individually negotiated"). It cited none of the Interstate Commerce Act cases relied upon in its certiorari petition.

[8] See *Sea-Land Serv., Inc.* v. *ICC*, 738 F.2d 1311, 1316-1319 (D.C. Cir. 1984); *MCI Telecomm. Corp.* v. *FCC*, 917 F.2d 30, 37-38 (D.C. Cir. 1990). The Interstate Commerce Commission has also concluded that, in setting rates, a carrier may take into account the volume of shipments without violating the anti-discrimination provision of the Interstate Commerce Act. See *Lawfulness of Volume Discount Rates by Motor Common Carrier of Property*, 365 I.C.C. 711, 715-716 (1982).

included in ICM agreements but are also omitted from the publication requirement are weight and size limits on covered mail items, and the location from which the mailer is required to tender the items to the Postal Service. See UPS Pet. App. A66-A68. Those two terms may reveal important business information about the customer that, if subject to the publication requirement, might deter large-volume mailers from using ICM service, or might enable the Postal Service's competitors, like UPS, to lure customers away from the Service.[9]

UPS has also argued that the Service's ICM program violates Section 403(c) because ICM is conditioned on a mailer's capability of tendering a threshold weight or dollar volume of mail, not its commitment actually to tender such a volume. As the court of appeals noted, any price discrimination that might result from this feature of the ICM program is not unreasonable, because it is supported by the Service's "logical and reasonable" business judgments. UPS Pet. App. A30. Offering customized service to large-volume mailers without requiring a particular volume commitment is a way for the Postal Service to induce valuable potential customers to give it some of their business; if the service offered is satisfactory, those customers may ultimately give the Service a large part of their high-volume

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[9] The list of terms to be published in the Postal Bulletin does not expressly include "[p]reparation requirements" and "[m]akeup requirements." See UPS Pet. App. A67-A68. Those terms, however, are subsumed within the requirement for publication of "[a] brief description of any worksharing to be performed by the mailer." *Id.* at A68.

international business.[10] The PRA does not prevent the Postal Service from making decisions about how to compete with private courier companies based on sensible business considerations; to the contrary, when Congress "launched [the Postal Service] into the commercial world" in 1970, it anticipated that the Service would make its operating decisions, including its decisions about rates, on the basis of such considerations. See *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512, 520 (1984); see generally *National Ass'n of Greeting Card Publishers* v. *United States Postal Service*, 462 U.S. 810 (1983).

2. Petitioner ACCA argues that review is warranted to resolve purported conflicts over application of the principles of deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). It first contends that there is a conflict among the circuits as to whether a court should "presume" that an agency has statutory authority to issue a regulation when considering the validity of that regulation under *Chevron*. See ACCA Pet. 14-16. Whether or not there is such a disagreement in the courts of appeals has no

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[10] The Postal Service stated in the *Federal Register* that its purpose in initiating ICM was "to attract customers that currently use its competitors and would not otherwise use the Postal Service for their international mailings." ACCA Pet. App. 71a. Large-capacity customers represent "the most promising market," *id.* at 72a, and "[r]equiring an ICM user to be capable of generating a substantial amount of international mail allows the Postal Service to focus its marketing efforts on the large business customers that collectively make up the most competitive market for international hard copy communications and parcel delivery services." *Id.* at 72a-73a.

relevance to this case, however, for the Postal Service plainly has statutory authority to establish international postage rates through individual agreements with customers.

Section 401 of the PRA lists, among the "general powers" of the Postal Service, the power "to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title." 39 U.S.C. 401(2). A broader grant of rule-making authority is difficult to imagine, and courts have recognized that the Postal Service has broad authority to carry out its duties.[11] Section 401(3) specifically authorizes the Postal Service to enter into and perform contracts,[12] and Section 401(10) expansively grants the Service "all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers." With specific reference to postage rates, Section 404(2) empowers the Service to "prescribe, in accordance with this title, the amount of postage and the manner in which it is to be paid," and Section 407(a) grants the Postal Service (with the President's consent) the power to "establish the rates of postage or other charges on mail matter conveyed between

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[11] See, *e.g.*, *Rockville Reminder, Inc.* v. *United States Postal Service*, 480 F.2d 4, 7 (2d Cir. 1973) ("Broad rule-making authority must be allowed a federal agency such as the postal service whose activities are national in scope and are geared to meet varied conditions and circumstances throughout the country.").

[12] ACCA's reading of Section 401(3) as limited to procurement contracts (see ACCA Pet. 16) is unsupported by the statutory language, which authorizes the Service "to enter into and perform contracts, execute instruments, and determine the character of, and necessity for, its expenditures."

the United States and other countries." Separately and together, those provisions give the Service ample authority to establish postage rates through individual contracts. ACCA evidently believes that Congress must expressly delineate every mechanism through which the Postal Service may exercise this broad grant of international rate-making authority, but there is simply no support in the statute, nor elsewhere, for such a cramped view of the Postal Service's authority.

3. ACCA asserts that there is a conflict among the circuits on whether legislative history may be considered at the first stage of the inquiry prescribed by *Chevron*. ACCA Pet. 17-22. Legislative history, however, played little role in the court of appeals' interpretation of the statute in this case. The court relied principally on the plain language of the PRA to conclude that the ICM program did not contravene the statute. See ACCA Pet. App. 28a-36a. The court gave little consideration to the legislative history of the PRA, except to observe that ICM is generally consistent with Congress's objectives in enacting the PRA (see *id.* at 41a-42a).

ACCA further urges the Court to consider whether *Chevron* deference to the Postal Service's interpretation of its governing statute is appropriate given what ACCA characterizes as the Postal Service's "monopoly" status. ACCA Pet. 25-30. This case does not present any such issue, however, for the court of appeals explicitly declined to accord deference to the Service's construction of the statute, and arrived at

its interpretation upon *de novo* consideration of this issue. See UPS Pet. App. A43.[13]

4. ACCA also asserts that review is warranted to resolve a conflict over the PRA's "primary purpose." ACCA Pet. 23. ACCA points to *National Association of Greeting Card Publishers* v. *United States Postal Service*, 607 F.2d 392, 403 (1979), cert. denied, 444 U.S. 1025 (1980), in which the D.C. Circuit remarked that the "dominant objective" of Congress in the PRA "was not so much the regulation of demand for postal services, as the prevention of discrimination among mail classes." 607 F.2d at 403. According to ACCA, that general statement conflicts with the Third Circuit's determination here that, in ACCA's words, "*the* primary purpose underlying the PRA" was to require the Postal Service to adopt modern business practices. ACCA Pet. 23 (emphasis added).

The asserted conflict does not warrant review by this Court. What the Third Circuit actually said was that "Congress repeatedly indicated that *a* primary purpose underlying the PRA was to require the Postal Service to discard its system of political patronage and bureaucratic decision-making in favor of modern business practices." ACCA Pet. App. 30a-31a (emphasis added). The requirement of modern business practices is entirely consistent with a

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[13] We argued in the court of appeals that the Postal Service's interpretation of the PRA is entitled to deference even though the Postal Service has a financial interest in that interpretation. See *Fort Wayne Community Schools* v. *Fort Wayne Educ. Ass'n*, 977 F.2d 358, 366 (7th Cir. 1992) (according deference to Postal Service's interpretation of the private express statutes, which determine the boundaries of the Service's monopoly on domestic letter carriage), cert. denied, 114 S. Ct. 90 (1993).

prohibition against unfair discrimination among business classes. Any difference in the two courts' general characterizations of the overall purpose of the PRA is too abstract, and too attenuated from the actual result in either case, to warrant this Court's review.

5. UPS urges that express, affirmative consent by the President is required by Section 407(a) for ratification of international rates set by the Postal Service. UPS Pet. 22-26. The court of appeals correctly rejected that argument.

The court of appeals noted that, under the unbroken historical practice, dating back to 1851 legislation, which permitted the Postmaster General, "by and with the consent of the President," to change international postal rates set by Congress, "the President [n]ever has affirmatively manifested, by word or deed, his consent to changes in international rates." UPS Pet. App. A37-A38. "The President and postal authorities have long interpreted § 407(a) as not requiring the affirmative consent of the President." *Id.* at A38. Given that "undisputed historical record" (*ibid.*), the court "decline[d] * * * to prescribe certain procedural steps the President must take" to manifest his consent to international postal rates established pursuant to Section 407(a). UPS Pet. App. A39.

UPS contends that the court's reading of Section 407(a) is undermined by the fact that the President, when exercising authority under other statutes containing language requiring presidential consent, has expressed his consent affirmatively. UPS observes that the President has always consented expressly to postal treaties and statutes negotiated by postal authorities pursuant to another clause of

Section 407(a). UPS Pet. 24-26. But the language of Section 407(a) contains no indication of the manner by which the President must manifest his consent to international postal rates. Nor does anything in the statute bar the President from deciding that some matters (such as the conclusion of international conventions) should not go forward without his express, affirmative consent, but that the agency may proceed with its announced course of action with respect to other ratemaking matters, unless he objects. The practice by Presidents of giving affirmative consent to international postal treaties and conventions negotiated with foreign states by the Postal Service is natural, since such negotiations come within the core of the President's constitutional authority over foreign affairs. Cf. U.S. Const. Art. II, § 2, Cl. 2.[14]

This Court should be reluctant to disturb a presidential practice, concerning the relation between entities within the Executive Branch, that has existed without controversy for more than a century. Section 407(a) vests authority in the President to supervise the actions of the Postal Service, and it is for the President to determine how that supervisory authority shall be exercised. See *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947) (upholding, under the First War Powers Act of 1941, ch. 593, 55 Stat. 838, 50 U.S.C. App. 601 (1946), the President's power to transfer the

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[14] Even though the President has expressly delegated to the Postal Service his authority to consent to the establishment of the ICM program until the issuance of the court of appeals' mandate, he has declined to delegate his authority to consent to international postal treaties and conventions. App., *infra*, 2a.

functions of one federal agency to another one that he had created, and giving "great weight" to the President's repeated and consistent construction of his authority under that Act).

6. We believe that the court of appeals erred in concluding that petitioner UPS has standing to challenge the ICM program. UPS Pet. App. A8-A24. We argued below that both petitioners lack "prudential standing" to challenge international rates set by the Postal Service, because competitors of the Service are not within the "zone of interests" sought to be protected by the relevant provisions of the PRA, which are designed to protect users of the mails.[15] Therefore, even if the petitions did raise issues of statutory interpretation warranting this Court's consideration, we believe the Court should not review those issues unless and until a case presenting them is brought by a proper party.

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[15] We noted below that the "zone of interests" test might not apply to this case, because the Postal Service is not subject to the judicial review provisions of the Administrative Procedure Act (APA), see 39 U.S.C. 410(a), and this Court has indicated that the "zone of interests" test is best understood as a gloss on the APA's requirement that a plaintiff be "aggrieved by agency action within the meaning of the relevant statute," 5 U.S.C. 702. See *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 400 n.16 (1987). If the "zone of interests" test is inapplicable, petitioners would be subject to a more stringent test for standing. *Clarke* so indicated by stating that the prudential standing test might be different in cases not involving the "generous review provisions" of the APA. *Ibid.* We stated below that we were content to have this case analyzed under the "zone of interests" test because, if (as we have contended) petitioners do not satisfy that test, *a fortiori* they do not satisfy a more stringent standing test applicable to a non-APA case like this one.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1996

APPENDIX

Presidential Documents

Memorandum of December 15, 1994

Delegation of Certain Authorities Under 39 U.S.C. 407(a)

Memorandum for the Governors of the United States Postal Service

I have been advised by the Department of Justice that the United States District Court for the District of Delaware held in *UPS Worldwide Forwarding v. United States Postal Service*, Civil Action No. 93-340, May 16, 1994, that the Postal Service must obtain the approval of the President to establish rates of postage or other charges on mail matter conveyed between the United States and other countries.

On appeal of the decision to the United States Court of Appeals for the Third Circuit, the Government argues that the explicit consent of the President is not required. In the view of the Government, to the extent that 39 U.S.C. 407(a) does require the President to consent, it does not require that consent be given in any particular manner. The Government's position is that the failure of the President to object to the establishment of international postage rates and other charges is consent to the establishment of such

rates and other charges. This has been the practice of the Government for the past 120 years.

To the extent that the District Court's decision creates or appears to create an obligation for the President to give his consent to the establishment of rates of postage and other charges on mail matter conveyed between the United States and other countries in a particular manner, by virtue of the authority vested in me by the Constitution and the laws of the United States of America, including section 301 of title 3 of the United States Code, I hereby delegate to the Governors of the United States Postal Service, as defined by section 202(a) of title 39 of the United States Code, any authority vested in me by section 407(a) of title 39 of the United States Code, with respect to the establishment of rates of postage and other charges on mail matter conveyed between the United States and other countries. This delegation is effective until the date on which the Third Circuit Court of Appeals issues its mandate in the aforementioned appeal. This delegation relates only to the establishment of rates of postage and other charges on mail matter conveyed between the United States and other countries; it does not affect the obligation of the Postal Service to seek the consent of the President to negotiate and conclude postal treaties or conventions.

This memorandum shall be published in the **Federal Register**.

/s/ WILLIAM J. CLINTON
William J. Clinton

THE WHITE HOUSE,
Washington, December 15, 1994.